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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 576

ERCOLE LEONARDO AND ELSIE IRENE LEONARDO,
Petitioners,

VS.

BOARD OF COUNTY COMMISSIONERS OF ST. MARY'S COUNTY, MARYLAND, A BODY CORPORATE AND POLITIC, AND CONSTITUTING THE DISTRICT COUNCIL FOR "TALL TIMBERS-ON-THE-POTOMAC DISTRICT", A SEPARATE TAXING AND ASSESSMENT DISTRICT, ST. MARY'S COUNTY, MARYLAND, AND J. FRANK BAILEY, TREASURER FOR ST. MARY'S COUNTY, MARYLAND,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

HYMAN GINSBERG,
Counsel for Petitioners,
914 Garrett Building,
Baltimore 2, Md.

The Daily Record Co., Baltimore 1, Md.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Petitioners, Ercole Leonardo and Elsie Irene Leonardo, pray that a Writ of Certiorari issue to review the Decree of the Court of Appeals of the State of Maryland entered in the above case on July 30, 1957.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at 214 Md. 287, 134 A. 2d 284.

The opinion of the trial Court, the Circuit Court for St. Mary's County, Maryland, is unreported. It is, however, made a part of the Record Extract filed herewith.

JURISDICTION

The Decree of the Court of Appeals of Mary' nd was made and entered o. July 30, 1957, and a copy th eof is in the Record Appended hereto beginning at page 34. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1257(3).

QUESTIONS PRESENTED

In a suit by the Petitioners to enjoin the levy of an assessment benefit tax and ad valorem tax on the property of the Petitioners, Ercole Leonardo and Elsie Leonardo in connection with the erection of a sea wall by the County Commissioners of St. Mary's County constituting the District Council for "Tall Timbers on the Potomac" a separate taxing and assessment District of St. Mary's County on the grounds that such assessment and tax were void as applied to such property because it violated the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution, it was held by the trial Court that the benefit assessment was void as applied to the property of the Petitioners, but that the ad valorem tax was valid.

The Court of Appeals of Maryland affirmed the holding of the trial Court and added further that the State shall have the right to acquire by eminent domain the sea-wall around the property of the Petitioners which sea-wall was

built by the Petitioners themselves and not built by the County Commissioners, when the County Commissioners saw fit to do so.

The Court of Appeals of Maryland held (Appendix, pages 17-34), 134 A. 2d pages 288, 295, 296, that the County Commissioners of St. Mary's County could levy an ad valorem tax of $2.50 per $100. of the assessable basis. This included the value which had been conferred by the improvements made in the project, although in fact no improvements were made for the Petitioners. The ad valorem tax included also a portion which was to be used for the payment of interest on the bond issue, since said bond issue was made to secure the money to pay for the wall built in the project. Since the ad valorem tax as levied includes interest and cost of maintaining and keeping in repair the paid Erosion Prevention Works, the assessment of the ad valorem tax, without excluding that portion intended for the payment of interest on the bond issue, was indirectly assessing the Petitioners for a benefit not received, which the Court, in its Opinion, had stated cannot be done.

See Opinion of Court, page 17, Appendix, and see Record Extract, page 46.

Although the lower Court and the Court of Appeals both held that the property of the Petitioners was not subject to a benefit assessment both Courts indirectly subjected the Petitioners to such an assessment by permitting an ad valorem tax based on the assessment value of the property of the Petitioners and this included the value added to it by virtue of the benefits conferred by the improvements made under the erosion prevention plan though no such benefits were actually conferred as the Petitioners had themselves at their own expense erected a sea-wall in front of their property which was in good condition.

The Plaintiffs attempted to show that the County Commissioners for St. Mary's County, Maryland, acting under Chapter 66 of the Acts of 1950 constructed a bulkhead with jetties as an erosion prevention process along the shore of the Potomac River in front of certain lots in a sub-division known as "Tall Timbers on the Potomac" in St. Mary's County. Thereafter, under Chapter 277 of the Acts of 1953 the Commissioners levied certain taxes and assessed certain benefit charges against some of the property in that sub-division including that of the Complainant. The Respondents will proceed to collect the taxes and benefit charges unless they are enjoined and prevented from doing so and they also intend to levy additional taxes in connection with this project unless restrained from doing so.

The original Statute was Chapter 66 of the Acts of 1950. It was thus enacted during an even year of the Legislature of Maryland that is, during the thirty day session. This legislation was void under the State Constitution.

The preamble to Chapter 277 of the Acts of 1953 indicated that the legislators considered Chapter 66 of the Acts of 1950 unconstitutional in violation of Maryland Constitution, Article 3, Section 15.

Under the Act of 1953, all property within the subdivision must be included within the taxing district. However, a substantial amount of the property was omitted from the taxing district defined by the Commissioners.

The Petitioners, Ercole Leonardo and Elsie Irene Leonardo, own a parcel of land in the subdivision known as "Tall Timbers on the Potomac," their lots being Number 43 and 44 on the Plat in Liber J. M. M. No. 2, Folio 322 of the Land Records of St. Mary's County.

They acquired this parcel in 1936. It was improved by two dwelling houses, a seawall and certain other improvements.

Thus, while their property was within the district established by the Commissioners, they derived no benefit from the erosion works as they had, at the time of the construction, adequate protection which they have maintained at their own expense.

This wall in front of the property of the Petitioners was in good condition (E. 201).

The questions presented are:

1. Could the County Commissioners of St. Mary's County in pursuance of an unconstitutional law the Act of 1950, Chapter 66, of Maryland, erect a project and then, after the work had been fully done, pass another statute, the Act of 1953, Chapter 277 of Maryland, and attempt to ratify what had already been done under an unconstitutional law and then indirectly assess, by way of an ad valorem tax, the property of the Petitioners for the alleged benefits conferred on their property?

2. Could the County Commissioners of St. Mary's County assess an ad valorem tax against the property of the Petitioners and indirectly assess the property of the Petitioners by way of this ad valorem tax for the benefits allegedly conferred on their property although no such benefits were actually conferred inasmuch as the Petitioners had already erected a proper and satisfactory seawall in front of their property?

3. If, as the Court of Appeals of Maryland held, the property of the Petitioners was not subject to benefit assessment because they had themselves at their own expense already erected a proper and satisfactory sea-wall in front

of their property, could that Court then hold that the ad valorem tax levied by the County Commissioners of St. Mary's County which was to be used for the payment of interest on the bond issue made to obtain the money to pay for the sea-wall was valid? Was not that portion of the ad valorem tax levied by the County Commissioners which was to be used for the payment of interest on the bond issue invalid since such bond issue was made to secure the money to pay for the sea-wall? Was this not a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

4. Could the County Commissioners of St. Mary's County properly exclude from all assessments two lots which it was admitted abutted on navigable water and were covered by the sea-wall built by the County Commissioners and at the same time indirectly by way of an ad valorem tax assess the property of the Petitioners for benefits conferred on those two lots as well as on the other lots protected by the sea-wall, when, according to the Court of Appeals of Maryland, the property of the Petitioners was already amply protected by the sea-wall built by them at their own expense in front of their property? Was not this a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

It is to be noted that the trial Court held that the County Commissioners must include the above two lots in making their assessment while the Court of Appeals of Maryland held that the County Commissioners of St. Mary's County could properly exclude them.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, 14th Amendment:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Chapter 66, Acts of 1950 of the General Assembly of Maryland.

3. Maryland Constitution, Art. III, Sec. 15:

"* * * In any thirty-day sessions in even years, the General Assembly shall consider no bills other than (1) Bills having to do with budgetary, revenue and financial matters of the State Government, (2) Registration dealing with an acute emergency and (3) legislation in the general public welfare * * *."

4. Chapter 277, Acts of General Assembly of 1953, Code Maryland 1957 Supplement, Article 25, Sections 156 to and including 162.

The pertinent provisions of this Statute are included in the Appendix to this Petition.

STATEMENT OF THE CASE

The Petitioners brought suit to enjoin the levy of an assessment benefit tax and an ad valorem tax on the property of the Petitioners in connection with the erection of a sea-wall by the County Commissioners of St. Mary's

County constituting the District Council of "Tall Timbers on the Potomac" a separate taxing and assessment District of St. Mary's County.

Both the trial Court and the Court of Appeals of Maryland held that the benefit assessment could not be made against the property of the Petitioners because they themselves had already erected a sea-wall on the front of their property which was in good condition. However, the trial Court and the Court of Appeals both upheld the ad valorem tax. See 134 A. 2d pages 295, 296 and Appendix, page 17.

The Court of Appeals of Maryland held (Appendix, pages 17, 20 and 134 A. 2d 288, 295, 296) that the County Commissioners of St. Mary's County could levy an ad valorem tax of $2.50 per $100 of the assessable basis. This included the value which had been conferred by the improvements made in the project although in fact no improvements were made for the Petitioners. The ad valorem tax included also a portion which was to be used for the payment of interest on the bond issue, since said bond issue was made to secure the money to pay for the wall built in the project. Since the ad valorem tax as levied includes interest and cost of maintaining and keeping in repair the said Erosion Prevention Works, the assessment of the ad valorem tax without excluding that portion intended for the payment of interest on the bond issue was indirectly assessing the Petitioners for a benefit not received, which the Court in its Opinion had stated cannot be done. See Opinion of Court, pages 17, 33, Appendix, and see Record Extract, page 46.

After the opinion of the Court of Appeals of Maryland was handed down, the Petitioners filed a Motion for Reargument which appears on page 35 of the Appended Record and in that motion for reargument they pointed

out that they would be indirectly assessed on ad valorem tax to pay the interest on the bond issue and were thus being indirectly assessed for the benefit which the Court of Appeals in its Opinion had held that they were exempt from. See Opinion, pages 17, 33 of Appendix and see Extract Record, page 41. This Motion for Reargument was denied on September 24, 1957.

Thus it stated on pages 44-45 of the Record Extract that:

> "Both the principal of and interest on the bonds will be payable in lawful money of the United States of America at the time of payment at the First National Bank of St. Mary's, Leonardtown, Maryland and, the bonds will be issued subject to registration as to principal only by the County Clerk of St. Mary's County, Court House, Leonardtown, Maryland. The bonds will be issued without option of prior payment.
>
> Bidders are requested to submit sealed, written bids for the issue of bonds above described. Bidders are requested to specify with their bids the rate or rates of interest to be paid on the bonds on which rate or rates their bids are based and submitted. The rate or rates of interest shall not exceed the annual rate of five per cent (5%) and must be in multiples of one-eighth (⅛) or one-tenth (1/10) of one per cent (1%). Bidders may specify more than one interest rate to be borne by said bonds, but may not specify more than one rate for any bond or any annual series of said bonds. The bonds will be awarded to the bidder quoting the lowest rate or combined rates of interest named in any legally acceptable proposal and offering to pay not less than par for the bonds. As between bidders naming the same rate or rates of interest, the proposal of the bidder offering to pay the largest premium for said bonds shall be accepted; where the bids of two or more bidders are identical in interest cost the bonds will be apportioned equally between said bidders, but if this should prove unacceptable, the County Commissioners of St. Mary's County may determine to which of said bidders

the said bonds will be awarded. The lowest rate or rates of interest will be determined on the basis of the lowest interest cost to the County of the money borrowed from the date of issue of the bonds to the last date of maturity thereof by adding the dollar amount of interest payable on each bond to maturity under any proposal and deducting from the total thereof the amount of premium offered to be paid for such bonds in any such proposal. Each bidder is requested to show on his bid the average interest cost to the County and the total dollar amount of interest payable over the life of the bonds, as produced by said bid, but this request shall not constitute a condition of the sale."

It is stated, further, on page 46 of the Record Extract that:

"The principal of and interest on said bonds are payable from special benefit assessments and *ad valorem* taxes which the County Commissioners of St. Mary's County, acting as District Council, is authorized and directed to levy and collect in the Tall Timbers on-the-Potomac Taxing and Assessment District in rate and amount sufficient to provide for the payment of said principal and interest. Provision for the levy of said special assessments and said *ad valorem* taxes upon all assessable real property within said district is made in the above mentioned Resolutions of the County. In addition, said bonds are unconditionally guaranteed as to principal and interest by said County and the full faith and credit of the entire County is pledged to the performance of said guaranty."

It is stated also on page 54 of the Record Extract that:

"WHEREAS, it has been determined by the said Board of County Commissioners acting as said District Council that the sum of Three Thousand, Two Hundred and Fifty Dollars ($3,250.00) is required to be raised during the calendar year 1954 by *ad valorem* tax on the assessable property in said Taxing and Assessment Dis-

trict improved by said Erosion Prevention Works to pay the interest on the aforesaid Bonds due in said year and to pay the costs of maintaining and keeping in repair the said Erosion Prevention Works, and to pay the expenses incurred by said Board of County Commissioners acting as said District Council in connection with said Erosion Prevention Works, * * *."

The County Commissioners of St. Mary's County excluded from all assessments two lots which it was admitted abutted on navigable water and were covered by the sea-wall built by the County Commissioners (Record Extract at page 198) and at the same time indirectly by way of an ad valorem tax assessed the property of the Petitioner for benefits conferred on those two lots as well as on the other two lots protected by the sea-wall when, according to the Court of Appeals of Maryland, the property of the Petitioners was already amply protected by the sea-wall built by them at their own expense in front of their property.

In upholding this exclusion of the two lots the Court of Appeals of Maryland overruled the trial Court which had held that the County Commissioners must include the above two lots in making their assessment. See 134 A. 2d p. 296 and see Appendix to this Petition, page 34.

The original statute authorizing the erosion project in this case was the Act of 1950, Chapter 56 of the Acts of the General Assembly of Maryland. It was unconstitutional because it was passed during an even year of the Legislature and was void under the Maryland Constitution, Art. III, Sec. 15. *Funk v. Mullan Contracting Co.*, 78 A. 2d 632, 197 Md. 192. Act of 1953, Chapter 277 was passed after the project had already been fully completed under the unconstitutional law. Its purpose was to ratify and make good what had already been done in pursuance of an unconstitu-

tional law. The trial Court and the Court of Appeals of Maryland both held that the Act of 1953 was valid in spite of its retroactive effect. See 134 A. 2d p. 291 and see Appendix to this Petition, pages 24, 25.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court of Appeals of Maryland interpreted the statute, the Act of 1953, Chapter 277 of the General Assembly of Maryland in such a way as to permit the property of the Petitioners to be taken in violation of the due process clause and the equal protection clause of the 14th Amendment to the Federal Constitution.

In permitting the above Statute of 1953, Chapter 277, to be passed so as to validate a project which had already been fully completed under an unconstitutional law, the Acts of 1950, Chapter 66 of the General Assembly of Maryland, the Court of Appeals permitted the Legislature by retroactive action to instill life into a void and unconstitutional law. To permit the property of the Petitioners to be assessed in pursuance of the new statute was a taking of their property without due process of law.

The County Commissioners of St. Mary's County were permitted by the opinion of the Court of Appeals to assess an ad valorem tax against the property of the Petitioners and indirectly to assess the property of the Petitioners by way of this ad valorem tax for the benefit allegedly conferred, inasmuch as the Petitioners had already at their own expense erected a proper and satisfactory sea-wall in front of their property.

The Petitioners are thus made to pay for something which they did not receive.

The decision on this question is important not only because the rights of the Petitioners have obviously been violated, but the question bears public importance because it presents a case in which property is being taken without due process of Law and yet this becomes apparent only when a closer view of the taxing and assessing statute is considered.

If this form of statute is permitted, the restrictions meant to be imposed by the 14th Amendment can be obviated by merely calling the tax an ad valorem tax instead of a benefit tax. The result to the Petitioners is just as harmful as would be the open imposition of a benefit assessment. Yet the Court of Appeals of Maryland in its opinion (134 A. 2d 295, 296) holds that the property of the Petitioners was exempt from the benefit assessment.

McQuillin, Municipal Corporations, 3rd Ed. Vol. 14, Sec. 32.32, says:

> "* * * But apart from such express prohibition, it is the settled law that special assessments can be sustained only upon the theory that the property assessed receives some special benefit differing from the benefit that the general public enjoys. This is the foundation of the right to levy special assessments and without such foundation the right must fall."
>
> *In re Seattle*, 66 Wash. 327, 119 Pac. 852;
> *In Re: Marginal Way*, 112 Wash. 418, 192 Pac. 961;
> *Philadelphia v. Standard Oil Co.*, 79 F. 2d 764 Aff'g, 12 F. Supp. 642;
> *Mosher v. Phoenix*, 139 Ariz. 470, 7 P. 2d 622;
> *Philadelphia B. & W. R. R. v. Hazen*, 116 F. 2d 543;
> *Jardene v. Borough of Rumson*, 30 N. J. Super. 509, 105 A. 2d 420;
> *Consolidated Gas and Elec. Co. v. Baltimore*, 130 Md. 20, 99 A. 968;
> *Friedenwald v. Baltimore*, 74 Md. 116, 21 A. 55.

The form in which due process is violated should not matter. The Court will look behind form to substance.

See *Georgia Power Co. v. Decatur*, 295 U. S. 165, 79 L. Ed. 1365, 56 S. Ct. 606; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. Ed. 455, 10 S. Ct. 862; *Chicago B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341.

If, as the Court of Appeals held, the property of the Petitioners was not subject to benefit assessment because they had themselves at their own expense already erected a proper and satisfactory sea-wall in front of their property that Court could not then hold that the ad valorem tax levied by the County Commissioners of St. Mary's County which was to be used for the payment of interest on the bond issue made to obtain the money to pay for the sea-wall was valid. This was a taking of property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

The County Commissioners of St. Mary's County could not properly exclude from all assessments two lots which it was admitted abutted on navigable water and were covered by the sea-wall built by the County Commissioners and at the same time indirectly by way of an ad valorem tax assess the property of the Petitioners for benefits conferred on those two lots as well as on the other lots protected by the sea-wall, when according to the Court of Appeals of Maryland the property of the Petitioners was already amply protected by the sea-wall built by them at their own expense in front of their property. This was a violation of the equal protection clause of the 14th Amendment to the Constitution of the United States.

In upholding this exclusion of the two lots, the Court of Appeals of Maryland overruled the trial Court which had

held that the County Commissioners must include the above two lots in making their assessment.

Gast Realty and Investment Co. v. Schneider Granite Co., 240 U. S. 55, 60 L. Ed. 523, 36 S. Ct. 354;
Baltimore v. Cahill, 126 Md. 596, 95 Atl. 473;
Tapp v. Johnson, 174 Ky. 532, 192 S. W. 504;
In re Eight Ave., Northwest, 77 Wash. 570, 138 Pac. 10;
Peterson v. Board of Supervisors, 208 Iowa, 748, 226 N. W. 1;
Halpin v. Campbell, 71 Mo. 493.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HYMAN GINSBERG,
Counsel for Petitioners,

ERCOLE LEONARDO,
ELSIE IRENE LEONARDO,
Petitioners.

Dated, Baltimore, Maryland,
October 25, 1957.

APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 230, October Term, 1956

ERCOLE LEONARDO, ET UX, ET AL.

v.

BOARD OF COUNTY COMMISSIONERS OF
ST. MARY'S COUNTY, MARYLAND, ETC., ET AL.

Brune, C. J., Collins, Henderson, Hammond, Prescott, JJ.

Opinion by Prescott, J.

Filed: July 30th, 1957.

OPINION

In this case, there are cross appeals from a decree of the Circuit Court for St. Mary's County. The decree enjoined the appellees and cross-appellants (hereafter called "appellees") from collecting a front foot benefit tax assessed and levied against two lots belonging to Ercole Leonardo, and wife, two of the appellants and cross-appellees (all of the appellants and cross-appellees are hereafter called "appellants"). It also authorized the appellees to collect *ad valorem* taxes assessed and levied against the said two lots, and front foot benefit taxes and *ad valorem* taxes assessed and levied against all the other lots in a separate taxing and assessment district; provided and upon the condition that two additional lots be included in the separate taxing and

assessment district and that front foot benefit and *ad valorem* taxes be assessed and levied against these two lots. The appellants attack the constitutionality of the legislation by which the taxation was authorized and the manner of performance of a contract for the construction of erosion prevention works, which construction was the cause of the taxation as authorized. The appellees appeal from that part of the decree which concerns the collection of the front foot benefit tax on the Leonardos' lots, and the requirement that two additional lots be included in the taxing district.

Chapter 66, Acts of 1950 of the General Assembly authorized the County Commissioners of the State to set up special taxing districts for erosion prevention work in every subdivision of land in any county subdivided for residential and business uses, and abutting or bordering upon the Chesapeake Bay and tributaries, or upon any other stream or body of water in the State, as shown in plats recorded among the land records in the county. The act further provided that the erosion prevention works were authorized after written application of 75 per cent of the property owners in the district. To finance the project, the County Commissioners, acting as a District Council, were authorized to issue notes, certificates of indebtedness or bonds maturing serially, payable in fifteen years and guaranteed as to principal and interest by the county.

The act required a hearing to be held in connection with the plans and specifications and the award of a contract to the lowest responsible bidder, after the customary advertising. After the construction of the erosion prevention works, the owners were to be subject to a benefit charge on each lot in the district according to the benefits received by each lot, as determined by the Commissioners after a public hearing. In addition, the act authorized an *ad valorem* tax against all the property in the district to meet payments of interest and principal on the county obligations and to pay for the maintenance and repair of the erosion prevention works. It further provided that the County Commissioners could reimburse themselves for expenses

incurred in the administration of the project in an amount not to exceed two hundred dollars each, annually.

"Tall Timbers on the Potomac" is a residential subdivision abutting and bordering on the Potomac River in St. Mary's County. In 1951, the required 75 per cent of the lot owners petitioned the County Commissioners to have erosion prevention works constructed in their district. After a public hearing with respect to the plans and specifications, the county advertised for bids, and, on August 28, 1951, the county entered into a contract with the lowest responsible bidder, Neil MacDonald, whereby the contractor agreed to (a) construct approximately 2,150 linear feet of timber seawall at $23.00 per linear foot measured in place; (b) construct timber jetties spaced 30 feet on centers at $10.00 per linear foot, and (c) to place earth backfill in place from the existing earth banks to the new seawall for $1.50 per cubic yard measured in place. According to the record, the surveying of the projects began in the early part of 1951, and the construction of the erosion prevention project was completed in February, 1953, and was duly accepted and paid for.

While the construction was in progress, approximately 150 feet of the seawall was damaged by storms. The plans and specifications called for a "free standing" wall. The County asked for a bid from the contractor for "tieing" the seawall to the shore and for straightening the seawall damaged by the storms. The bid was $3,000.00 for the extra work which the County Commissioners concluded was reasonable and which bid they accepted on June 6, 1952. The authority for an award in extras was contained in the contract.

By reason of two decisions of this Court in February, 1951, with respect to the type of legislation which may be enacted at a "short session" of the General Assembly, serious doubt was cast on the constitutionality of Chapter 66, Acts of 1950. Accordingly, that act was introduced in substantially the same form at the next regular session of the General Assembly following these Court decisions and

was enacted as Chapter 277, Acts of 1953. All actions taken under the 1950 Act by any Board of County Commissioners were validated and confirmed by the provisions of this later act. At the time of the effective date of this later date of this later act on June 1, 1953, the erosion prevention works contract had been fully completed. Thereafter, the County Commissioners by resolution of August 11, 1953, authorized the issuance of serial bonds of the county in the principal amount of $100,000 to pay for the entire expense of the construction of the said project. The bonds were subsequently sold at a public sale. As disclosed by the record, the total cost of the project, including legal services, printing of the bonds and newspaper advertising, amounted to $97,160.31.

On October 13, 1953, the County Commissioners, acting as District Council for the Taxing and Assessment District of Tall Timbers on the Potomac, adopted a resolution in which they designated the territory within said district to bear the special taxation authorized by Chapter 277, Acts of 1953, by reason of the benefits accruing to certain lots within the said district. The resolution found that the waterfront lots had been benefited by the project in a ratio of two to one to the benefit of the non-waterfront properties in the district. A front foot benefit tax assessed on the said basis and an *ad valorem* tax of $2.50 per $100 of the assessable basis were levied on all the lots in the district.

Bills for the special taxation for the year 1954 were mailed to all of the lot owners in the district, and appellants, Leonardos, objected to the special levy on their lots Nos. 43 and 44. On July 6, 1954, the Leonardos filed a bill of complaint in the Circuit Court for St. Mary's County, seeking an injunction to declare Chapter 66, Acts of 1950, and Chapter 277, Acts of 1953, unconstitutional. Thereafter, on October 5, 1954, eight of the residents of the District moved the court for permission to join as parties complainants in the Leonardo suit, and they were duly joined in the proceedings. Those eight additional complainants were among those who petitioned the County Commissioners to have constructed the erosion prevention works

in Tall Timbers on the Potomac. After a hearing in open court, the chancellor passed a decree as above noted, and the respective appeals were noted.

I.

The appellants first contend that the title of Chapter 277 of the Acts of 1953 is invalid under Article 3, section 29, of the Constitution of Maryland. Said section reads, in part, as follows: "* * * and every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title; * * *."

The appellants claim that the title is defective because: (a) the body of the act (sec. 161(c)) requires a levy of *ad valorem* taxes upon all the assessable property in the county should the "benefit" and "district" taxes prove insufficient to meet the obligations upon the bonds issued; (b) said section 161(c) contains certain penal provisions; (c) the body of the act provides for the allowance of personal expenses incurred by the County Commissioners because of erosion projects; (d) section 158(b) provides a different method of selling bonds from the provisions of article 31, secs. 34, 35 and 36 (Code 1939); and none of these items is specifically mentioned in the title.

Section 29 of Article 3 of the Constitution has been involved in cases before this Court on numerous occasions. It has been included in the last three Constitutions of this State, and its purposes are to prevent the combination in one act of several distinct and incongrouous subjects, and to inform the members of the legislature of the nature of the bills introduced, which are usually read to them by their titles only, and to permit the citizens of the State to know of proposed legislation. The general rule of its construction is that every presumption favors the validity of the statute, and reasonable doubt is enough to sustain it. The appellants here assert no claim that the statute embraces more than one subject. The cases arising under this section of the Constitution relating specifically to the requirement that the subject be described in the title may be

generally divided into those in which it is contended the title is not sufficiently descriptive, and those where it is claimed the title is misleading. This Court has consistently held that the Constitution is complied with if the title of the legislation *fairly* advises the legislature and the public of the real nature and subject matter of the legislation sought to be enacted. *Shipley v. State*, 201 Md. 96, 102. In order to do this, it is unnecesary that the title be an abstract of the text of the proposed statute, nor need mention be made of the means and the methods by which its purpose is to be accomplished. *Bond v. Mayor and C. C.*, 116 Md. 683, 688; *Painter v. Mattfeldt*, 119 Md. 466.

Having these principles in mind and the above mentioned objections, we shall now examine the title to Chapter 277. It provides for seven new sections to Article 25 of the Code and then states in part:

> "* * * said new sections * * * to be under the new sub-title 'Erosion', authorizing the County Commissioners of this State to set up Special Taxing Districts for erosion prevention work and specifying their powers and duties for these purposes; * * *."

We think this title is sufficiently comprehensive to fairly advise the legislature and the public of the real nature and subject matter of the statute, and that it is not misleading. (a) The fact that it fails to mention the *ad valorem* tax is neither deceptive nor misleading. This is a detail incident and germane to the subject-matter of the act. (b) And the same applies to the penal provision, which is limited to those persons handling funds of the erosion projects, and to (c) the provision for the payment to the County Commissioners for expenses incurred in inspecting the projects. (d) Nor do we consider the failure to mention in the title the method of selling the bonds rendered it defective or misleading. Section 33 of Article 31 provides for the method of sale of bonds sold by "public bodies", unless the enabling act authorizing their issuance shall specifically exempt said bonds from the provisions of said section, or provides a different method for the sale of the bonds. Section 158(b)

does both. We think that the method of the sale of the bonds was germane to "erosion prevention work" and was one of the "powers and duties" of the County Commissioners specified in the title as above noted. We fail to discover anything deceptive or misleading here.

The appellants also contend that the title is misleading in that it refers to "erosion prevention work", yet the body of the act names "residential and business properties abutting or bordering on rivers and streams in recorded subdivisions". The only reason assigned by the appellants that this is misleading is, "(t)he indication is that the act refers to erosion in the whole State of Maryland". We find no merit in this contention. The title refers to "erosion prevention works". The body of the act limits its application to business and residential subdivisions abutting or bordering on certain waters in the State. This does not present the situation of the body of a statute attempting to enlarge upon a specific limitation in its title as was the case in *Buck Glass Co. v. Gordy*, 170 Md. 685, 688, but the converse; so the appellants fail to sustain their argument that the title is misleading under this point.

The appellants make their final attack under this first heading by saying that Chapter 277 of the Acts of 1953 repealed sections 167 to 173 of Article 25, (the same being Ch. 66 of the Acts of 1950), and added seven new sections known as sections 156 to 162 to follow immediately after section 155 of the Code, 1951; that the 1951 Code numbered the provisions of Chapter 66 of the Acts of 1950 as sections 149 to 155 inclusive; and that the effect of the repeal of Chapter 66 of the Acts of 1950 by Chapter 277 of the Acts of 1953 was to remove sections 149 to 155 from the 1951 Code. They claim this results in a change in the numerical sequence of the sections of the Code and contravenes that portion of section 29 of Article 3 of the Constitution that reads:

> "* * * And whenever the General Assembly shall enact any Public General Law, not amendatory of any section or article in the said Code, it shall be the duty

of the General Assembly to enact the same, in articles and sections, in the same manner as the Code is arranged, * * *."

In passing Chapter 277, the legislature enacted the same under a new sub-title by article and in sections in the same manner as the Code is arranged. We think this fully complied with the constitutional requirement, and the fact that there are presently no sections 149 to 155, inclusive, in the 1951 Code does not violate this section of the Maryland Constitution.

II.

The appellants next contend that Chapter 66 of the Acts of 1950 was unconstitutional and it was not rendered valid by Chapter 277 of the Acts of 1953. They claim that a very substantial part of the work of the erosion project had been completed when Chapter 277 was enacted and it was "illegal" for the legislature "to attempt to make good a project which had already been substantially completed", as it amounted to the taking of property without due process of law.

We see no necessity to pass upon the constitutionality of Chapter 66. Between the passage of the two acts, the Commissioners had begun work on the erosion project. Surveying began in 1951 and by December of 1952, a substantial part of the construction had been completed. At the time Chapter 277 was passed, the Commissioners had contracted for the work to be done, but had not issued the bonds nor levied the taxes. If we assume, without deciding, that Chapter 66 was unconstitutional, this action of the Commissioners would be without authorization and *ultra vires*. However as pointed out above, Chapter 277 specifically ratified and confirmed any action taken and things done by the Commissioners under the purported authority of Chapter 66. There can be no question that a contract for this kind of construction is one that the legislature would have the power to sanction and authorize; and there was no disturbance of, or interference with, vested rights. In a situation of this kind, there can be no question that

the legislature possesses the power to pass a retropective law to make valid an *ultra vires* contract. In *O'Brian v. County Commissioners*, 51 Md. 15, (1879) this Court had before it a situation where work had been partially completed for street paving pursuant to a statute which, while the work was in progress, was declared unconstitutional. Curative legislation was passed, but the objection was raised that the *ultra vires* contract could not be made valid. At page 24 of the opinion this language appears:

> "If the Legislature possess the power to authorize one act to be done, it can by a retrospective Act, cure the evils which existed because the power thus conferred has been irregularly executed. *Thompson v. Lee County*, 2 Wall. 327; *People v. Mitchell*, 35 N. Y. 551.
>
> "In the same manner it has been decided in numerous cases that the Legislature may render valid a contract made by a municipal corporation, though *ultra vires* at the time it was made, if the contract is one which the Legislature might originally have authorized. Cooley, 379-381, and notes.
>
> "This principle applies with peculiar force to the case of a contract relating to a work in which the public is interested, and for the public benefit, after it has been executed; provided it be a contract which the Legislature had the power to permit or sanction in advance."

See also *C. and P. Tel. Co. v. Balto. City*, 89 Md. 689. 714; *Water Co. v. Havre de Grace*, 150 Md. 241, 253. We therefore conclude that Chapter 277 rendered valid the contracts for the construction of the erosion project made by the Commissioners, and there was no taking of property without due process of law.

III.

The appellants further claim that Chapter 277 violates section 54 of Article 3 of the Maryland Constitution. This section reads as follows:

> "No County of this State shall contract any debt or obligation in the construction of any Railroad, Canal, or other Work of Internal Improvement nor give, or loan its credit to or in aid of any association, or corporation, unless authorized by an Act of the General Assembly, which shall be published for two months before the next election for members of the House of Delegates in the newspapers published in such County, and shall also be approved by a majority of all the members elected to each House of the General Assembly, at its next session after said election."

The appellants do not suggest that the erosion project was a "Work of Internal Improvement". Cf. *Bonsal v. Yellott*, 100 Md. 481; *Welsh v. Coglan*, 126 Md. 1; *Baltimore and D. P. Railroad Co. v. Pumphrey*, 74 Md. 86. They limit their argument of this point to a claim that the project benefited only private interests, namely, the waterfront property privately owned; and, as Chapter 277 was not published as provided in said section 54, it is invalid. Again, if we assume, without deciding, that if a project of the nature of that under consideration benefited only private interests it would come within the purview of section 54, appellants cannot be successful in this line of attack, because the erosion prevention works at Tall Timbers on the Potomac were undoubtedly constructed in the public interest and welfare. Cf. *Dinneen v. Rider*, 152 Md. 343, 365. The fact that privately owned properties may benefit from the project does not bring Chapter 277 within the provisions of section 54. The Counties as well as the State have a special interest in seeing their boundaries maintained and not eroded away. Among the many public benefits to be derived from a project of this nature is the fact that it will preserve real estate and improvements thereon for future taxation by public authority. We are, therefore, unable to discover any merit in this contention.

IV.

The appellants make the further claim that Chapter 277 is arbitrary, and in violation of the equal protection and

due process clauses of the Fourteenth Amendment to the Federal Constitution. They say that section 158(a) of Chapter 277 provides that a petition of seventy-five per cent of the property owners of the subdivision is required before the Commissioners can begin an erosion prevention project. They argue that if a subdivision were composed of eighty improved lots owned by twenty people, and twenty unimproved lots owned by twenty other people, the twenty people owning the unimproved lots could prevent a proposed project. They contend this renders the statute arbitrary and discriminatory on its face and is a denial of the equal protection of the law. Assuming the premise of this argument, we are unable to agree. The Equal Protection Clause guarantees that equal protection shall be given to all persons under like circumstances in the enjoyment of their civil and personal rights. But it does not preclude the States from resorting to reasonable classification for the purposes of legislation. *Tatlebaum v. Pantex Mfg. Co.*, 204 Md. 360, 369, 370. Without unduly prolonging this opinion, which, because of the many points raised, must be lengthy, we say that we are unable to discover anything arbitrary, unreasonable, or discriminatory in the classification made, and hold the legislature had the power and authority to require a petition from seventy-five per cent of the property owners before an erosion prevention work should start, without violating the Equal Protection Clause of the Federal Constitution. *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 116; *Wampler v. LeCompte*, 282 U. S. 172; *U. S. Mortgage Co. v. Matthews*, 293 U. S. 232.

The appellants say further that Chapter 277 is "uncertain in meaning"; that it uses the language "territory abutting or bordering, etc."; and "(a) Statute uncertain in meaning is unconstitutional because it amounts to a taking of property without due process of law." We have difficulty in discerning just what the appellants mean in assigning this rather unusual reason for attacking a statute as taking property without due process, but have set forth all they say upon the subject. As suggested in the appellee's brief, only a lifelong resident of the Sahara Desert

could be confused by the meaning of a subdivision "abutting or bordering" on a body of water. We find no merit in this contention of the appellants.

V.

The appellants advance as another contention: "(a)s the benefit charges and the erosion tax were not levied on the entire subdivision, seventy-five per cent of the property owners in the entire district did not make a request to erect the erosion work." It will be unnecessary to consider this as it is in direct conflict with a stipulation made in the court below (R. E. 98).

VI.

The appellants next contend that the contract for the construction of the project was not awarded to the lowest responsible bidder. The contract was awarded to Neil MacDonald as a whole, and the appellants claim there were lower bids for a "severable part of the project". They claim the county paid MacDonald for 15,600 cubic yards of back-fill at the price he bid of $1.50 per cubic yard, while a Mr. Mattingly had bid $1.25 per cubic yard for the same. The short and simple answer to this is that it was stipulated below that the Mattingly bid was not considered because it was not in proper form and unaccompanied by a deposit required (R. E. 96).

The appellants also contend that $3,000 was paid to MacDonald for extra work in straightening and tieing back the seawall, and this was not permitted by the contract. This is at complete variance with the facts. Article 5 of the contract authorized a charge for extra work when ordered in writing by the district council at a stated price. This extra work at the price named was ordered in writing by the council on June 6, 1952.

The appellants further claim that the extra work mentioned just above was necessitated by MacDonald's negligence, and that MacDonald failed to furnish a bond as called for in the bids and the awarding of the contract. However, neither of these claims is sustained by the record.

VII.

Under this heading, the appellants complain that the contract awarded for the project was not properly carried out and performed. They list some five or six alleged variations from the plans and specifications. It seems unnecessary to name them separately as the ones supported by the record seem to be trifling in nature. The chancellor states: "In this case it is apparent that there were variations in the contract but with the explanation given, they would appear to be minor and with a valid reason existing therefor." With this finding, we agree. The inspector for the commissioners was informed of all proposed changes and a report thereof was made to the commissioners, who, after the completion of the project, accepted and paid for it. Here, there is no allegation of fraud which may vitiate a public contract after the work performed has been accepted. It is well settled that it is no defense to an assessment that the contractor did not carry out the contract for the work strictly according to its terms. The proper authorities must decide upon this, and if they accept the work, the acceptance, in the absence of fraud, is conclusive. *Baltimore v. Raymo*, 68 Md. 569, 577, 578.

VIII.

The appellants state as an additional assignment of error that the "benefit charges" and "erosion taxes" have not been properly and fairly assessed. They assert that all lots in the "front section" were "put on the same basis", and all lots in the "rear section" were "put on the same basis", without regard to value. (It may be well to note here that the entire special taxing district is composed of two sets of lots, both roughly perpendicular to the waterfront, with one of the sets abutting the water and the other set lying immediately to the rear. Each lot has the same width, and the same depth excepting some contiguous to the water where the water-line meanders.) The appellants argue this made the assessments completely arbitrary as they were not made "on true evaluation". They claim this is a

violation of due process and equal protection and the requirement of uniformity under Article 15 of the Maryland Declaration of Rights. This contention is limited to the "benefit" tax, as the *ad valorem* tax was based on the assessed value of the different lots: The argument, in effect, is that the levy of a special or local assessment must be based upon the value of the land from which the assessment is exacted. However, it loses sight of the fundamental theory of the basis for special or local assessments for benefits. They stand upon widely different grounds from general taxes. *Brooks v. Baltimore*, 48 Md. 265, 268. Special assessments are in the nature of a tax upon property levied according to *benefits* conferred on the property. The whole theory of a special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the improvement. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no substantial pecuniary loss thereby; their property being increased in value by the expenditure to an amount substantially equal to the sum they are required to pay. 14 *McQuillin, Municipal Corporations*, secs. 38.01, 38.31, (3rd Ed.). This Court has recognized the validity of such assessments on many occasions. The mode of assessment is a legislative question, subject to constitutional limitations. The mode may be committed to municipal authorities and the general rule is that the exercise of their discretion therein, if made according to a definite and just plan, will not be reviewed by the courts where neither fraud nor mistake appear. *McQuillin, op. cit.* sec. 38.111. In some jurisdictions *ad valorem* assessments have been upheld, but they are certainly not required. *Dinneen v. Rider, supra.*

In the suit at bar, the enabling act placed discretion in the commissioners to make an assessment on the basis of benefits received, not on that of property value. The appellants neither assert nor attempt to prove that the benefits received were not substantially in accord with their assessments. Since all the waterfront properties have

equal widths, it was proper and reasonable to assume that control of erosion by waters of the Potomac River would benefit all the waterfront property in the district in an equal degree. Similarly, the non-waterfront lots, equal in width with all of the other lots, benefited, because without the erosion prevention work such properties in time could easily become waterfront lots and thereafter part of the bed of the river. The commissioners concluded that the waterfront properties had benefited in a ratio of two-to-one to the benefit of the non-waterfront lots, and placed the assessment on a front foot basis. Under a grant of power to assess property *benefited* by an improvement, municipal authorities are not confined to abutting property in making the assessment. *McQuillin, op. cit.* sec. 38.72. It will be noted that the rate of assessment was uniform and equal upon each class of property benefited. Even if Article 15 of our Declaration of Rights applies to special assessments (which we do not hold). there has been no violation thereof.

It will also be noted that the enabling act provides that each property owner shall be notified before the assessment is made and granted a hearing thereon; and, of course, there is always a further right to apply to the courts to relieve arbitrary or capricious action. When these occur, one cannot be said to have been deprived of his property without due process of law; and whenever the law, as in this case, operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied. *Walston v. Nevin*, 128 U. S. 578.

The appellants make a further claim that certain of the lots in the subdivision were not included in the taxing district, which resulted in an increased burden on the remaining lots. They neither assert nor attempt to prove that the lots not so included received special benefits from the improvement. Unless property receives a benefit from the improvement, no special assessment may be lawfully levied against it. *United R. and E. Co. v. M. and C. C. of Balto.*, 127 Md. 660, 670; *McQuillin, op. cit.*, sec. 38.31. In the establishment of improvement districts, within the restrictions of

the applicable law, broad discretion is vested in the municipal authorities, and this discretion is conclusive in the absence of evidence that its exercise was procured by fraud or that it is manifestly arbitrary or unreasonable, or that the assessment is palpably unjust and oppressive. *McQuillin, op. cit.*, secs. 38.55, 38.56. The record fails to disclose any reason why the commissioners were not justified in eliminating the lots they did from the taxing district.

IX.

Appellants make the further contention that the separate taxing and assessment district created by the Commissioners in this instance was not authorized and is illegal. They claim the enabling act, section 156, required that *all* property within the subdivision known as "Tall Timbers on the Potomac" *must* be included within the taxing district; and, as the Commissioners had failed to include several lots of said subdivision within the taxing district, the taxing district is illegal. We think a reading of the act refutes this argument. The title states the commissioners are authorized to "set up" special taxing districts; section 156 provides that territory *within* every recorded subdivision of land in this State, subdivided for residential or business uses, and abutting or bordering upon any stream or other body of water is created into separate taxing and assessment districts, each district to bear the name of the subdivision *out of which* it is created; section 157 authorizes the county commissioners to act as the district council for each taxing district and empowers them to acquire property, either by condemnation or otherwise, to prevent erosion; section 158 provides for the construction of erosion prevention works and the issuance of bonds to pay for them; section 159 requires notice to the property owners and a hearing after the plans and specifications have been completed and the procedure for the letting of contracts; and sections 160 and 161 provide that after the completion of an erosion prevention project and notice to the land owners the commissioners, acting as the district council, shall fix and levy a benefit charge upon all real estate in

said district benefited by erosion prevention works", and an *ad valorem* tax against "all the assessable property in each district so improved." We think a reading of these sections together clearly shows a legislative intention to authorize the county commissioners to create taxing and assessment districts for erosion prevention works from territory within recorded residential or business subdivisions abutting or bordering on the Chesapeake Bay and its tributaries or any other stream or body of water in this State. There are many subdivisions throughout the State that abut on water, with comparatively few of the lots actually bordering on the water. It is possible that some lots included in a subdivision might not receive any special benefit from an erosion prevention project, although many (as in the present case), in addition to those abutting on the water, would receive such benefits. Under our ruling made above, those lots which received no such benefits could not be assessed. However, if appellants' version be correct, *all* of the lots of the subdivision must be included in the taxing district; consequently, the assessment would be void as to any lot not specially benefited. We are unable to conclude that the legislature intended such an absurd result.

We are, therefore, of the opinion that the benefit assessment levied by the commissioners in this case is valid, with the exception of that levied on the two lots belonging to Ercole Leonardo and wife; and the *ad valorem* tax levied by the commissioners is valid against all of the lots in the taxing district as created by the commissioners. *Dinneen v. Rider, supra.*

X.

We come now to the cross-appeal. As the Leonardos had previously constructed a private seawall in front of their lots, the appellees concede the chancellor was correct in decreeing the two lots owned by the Leonardos were not properly subject to the benefit tax. However, they request that the decree be modified to the extent that if the commissioners acquire an easement in, or ownership of, the private seawall of the Leonardos, the commissioners there-

after could collect the benefit tax from the Leonardos or the subsequent owners of the two lots. We think the decree should be so modified. As the decree now reads, the commissioners are perpetually enjoined from collecting the benefit tax on these two lots. If, in the future, the commissioners acquire an easement in, or ownership of, the seawall, there is no just reason why they should be prevented from then collecting the assessment.

As stated at the beginning, the chancellor conditioned the collection of the assessments upon the commissioners bringing into the taxing district two additional lots that they had not so included. These two lots are at the extreme southern edge of the subdivision and at the time of the creation of the taxing district they were protected by seawalls considered by the county surveyor in 1951 as adequate. We pointed out above that in creating the improvement districts a broad discretion is vested in the commissioners, and stated the rule as to when their determinations will be reviewed. No fraud is alleged, and we are unable to say their action excluding these two lots was manifestly arbitrary or unreasonable. We therefore, conclude the chancellor was in error in conditioning his decree upon the requirement that these two lots be brought into the taxing district, and the decree should be so modified. In all other respects than the two modifications mentioned, the decree is affirmed.

DECREE AFFIRMED IN PART AND MODIFIED IN PART, AND THE CAUSE REMANDED FOR MODIFICATION OF THE DECREE IN ACCORDANCE WITH THIS OPINION. THE APPELLANTS TO PAY THE COSTS.

MOTION FOR REARGUMENT

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Motion for Reargument of the Appellants and Cross-Appellees, respectfully shows unto Your Honors:

1. It is stated on page 24 of the Opinion that:

> "We are, therefore, of the opinion that the benefit assessment levied by the commissioners in this case is valid, with the exception of that levied on the two lots belonging to Ercole Leonardo and wife; and the *ad valorem* tax levied by the commissioners is valid against all of the lots in the taxing district as created by the commissioners. *Dinneen v. Rider*, supra."

However, if the benefit assessment levied by the Commissioners in this case is not valid as to the two lots belonging to Ercole Leonardo and Elsie Irene Leonardo, his wife, then that portion of the *ad valorem* tax levied by the Commissioners, which is to be used for the payment of interest on the bond issue, is not valid, since said bond issue was to secure the money to pay for the wall built around them. Since the *ad valorem* tax as levied includes interest and cost of maintaining and keeping in repair the said Erosion Prevention Works, the payment of the *ad valorem* tax without excluding that portion intended for the payment of interest on the bond issue would be indirectly assessing the Leonardos' for a benefit not received, which the court in its opinion has stated cannot be done.

Therefore, as to interest, the Leonardos are, in fact, by indirect method, being assessed for the benefits from which the Opinion held that they were exempt. See Opinion page 3, and see also Extract Record, page 41.

Thus, it is stated on pages 39-40 of the Record Extract that:

"Both the principal of and interest on the bonds will be payable in lawful money of the United States of America at the time of payment at the First National Bank of St. Mary's, Leonardtown, Maryland and, the bonds will be issued subject to registration as to principal only by the County Clerk of St. Mary's County, Court House, Leonardtown, Maryland. The bonds will be issued without option of prior payment.

Bidders are requested to submit sealed, written bids for the issue of bonds above described. Bidders are requested to specify with their bids the rate or rates of interest to be paid on the bonds on which rate or rates their bids are based and submitted. The rate or rates of interest shall not exceed the annual rate of five per cent (5%) and must be in multiples of one-eighth (⅛) or one-tenth (1/10) of one per cent (1%). Bidders may specify more than one interest rate to be borne by said bonds, but may not specify more than one rate for any bond or any annual series of said bonds. The bonds will be awarded to the bidder quoting the lowest rate or combined rates of interest named in any legally acceptable proposal and offering to pay not less than par for the bonds. As between bidders naming the same rate or rates of interest, the proposal of the bidder offering to pay the largest premium for said bonds shall be accepted; where the bids of two or more bidders are identical in interest cost the bonds will be apportioned equally between said bidders, but if this should prove unacceptable, the County Commissioners of St. Mary's County may determine to which of said bidders the said bonds will be awarded. The lowest rate or rates of interest will be determined on the basis of the lowest interest cost to the County of the money borrowed from the date of issue of the bonds to the last date of maturity thereof by adding the dollar amount of interest payable on each bond to maturity under any proposal and deducting from the total thereof the amount of premium offered to be paid for such bonds in any such proposal. Each bidder is requested to show on his bid the average interest cost to the County and the

total dollar amount of interest payable over the life of the bonds, as produced by said bid, but this request shall not constitute a condition of the sale."

It is stated, further, on page 41 of the Record Extract that:

"The principal of and interest on said bonds are payable from special benefit assessments and *ad valorem* taxes which the County Commissioners of St. Mary's County, acting as District Council, is authorized and directed to levy and collect in the Tall Timbers on-the-Potomac Taxing and Assessment District in rate and amount sufficient to provide for the payment of said principal and interest. Provision for the levy of said special assessments and said *ad valorem* taxes upon all assessable real property within said district is made in the above mentioned Resolutions of the County. In addition, said bonds are unconditionally guaranteed as to principal and interest by said County and the full faith and credit of the entire County is pledged to the performance of said guaranty."

It is stated also on page 49 of the Record Extract that:

"WHEREAS, it has been determined by the said Board of County Commissioners acting as said District Council that the sum of Three Thousand, Two Hundred and Fifty Dollars ($3,250.00) is required to be raised during the calendar year 1954 by *ad valorem* tax on the assessable property in said Taxing and Assessment District improved by said Erosion Prevention Works to pay the interest on the aforesaid Bonds due in said year and to pay the costs of maintaining and keeping in repair the said Erosion Prevention Works, and to pay the expenses incurred by said Board of County Commissioners acting as said District Council in connection with said Erosion Prevention Works, and"

2. It is stated on page 25 of the Opinion of this Honorable Court, that:

> "As stated at the beginning, the chancellor conditioned the collection of the assessments upon the Commissioners bringing into the taxing district two additional lots that they had not so included. These two lots are at the extreme southern edge of the subdivision and at the time of the creation of the taxing district they were protected by seawalls considered by the county surveyor in 1951 as adequate. We pointed out above that in creating the improvement districts a broad discretion is vested in the Commissioners, and stated the rule as to when their determinations will be reviewed. No fraud is alleged, and we are unable to say their action excluding these two lots was manifestly arbitrary or unreasonable. We therefore, conclude the chancellor was in error in conditioning his decree upon the requirement that these two lots be brought into the taxing district, and the decree should be so modified."

It is respectfully submitted to this Honorable Court that a direct benefit accrued to lots 49 and 50 in that a complete new wall, together with jetties, was built in front of lots 49 and 50 and in fact was extended 47 feet beyond lot 50 to connect with an existing wall (Record Extract 175).

It is true that the original Erosion District created by the Commissioners began with lot 5 at the north and ended at lot 48 to the south, Record Extract 48, and as shown on Exhibit 4, Record Extract 54 to 56. This consisted of 40 waterfront lots of 50 feet each and 8 right of ways of 25 feet each for a total of 2200 feet. Lots 42-43-44 covering 150 feet had in place a usable wall to which the new wall was attached. The Leonardos being the owners of lots 43 and 44. Exhibit 4 indicates an existing wall. Eliminating the 150 feet of usable wall, 2050 feet of new wall was required.

It is submitted to this Honorable Court, that when the bids for the new wall were called for, Record Extract 57, 2150 feet of new wall construction was contemplated and included lots 49 and 50, thereby adding 100 feet to the 2050 feet required to conform to the footage for the original Erosion District. The successful bidder submitted a bid on 2150 feet (Record Extract 77) and the Commissioners accepted his bid based on 2150 feet (Record Extract 69 and 70) which included 100 feet of wall and jetties to be constructed in front of lots 49 and 50.

The final requisition for payment submitted by the contractor called for 2199 feet of wall (Record Extract 86) which exceeded his original bid by 49 feet. This 49 feet represents the section of wall constructed to meet and tie into an existing wall to the south of lot 50 as testified by Mr. Thompson (Record Extract 175).

With this testimony before him, the Chancellor conditioned the collection of the assessment upon the Commissioners bringing into the taxing District lots 49 and 50 which were receiving a direct benefit, yet had not been included in the Erosion District.

It is respectfully submitted that for this Honorable Court to rule that Ercole and Elsie Leonardo be assessed for *ad valorem* taxes which include interest on benefits they have not received or to rule that lots 49 and 50, which are receiving all the benefits to be received by the other property owners in the Erosion District, be entirely exempt from both benefit assessment and *ad valorem* taxes, would violate the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution as well as Articles 15 and 23 of the Maryland Declaration of Rights.

It is respectfully submitted that such construction would permit the property of Ercole Leonardo and Elsie Irene Leonardo, his wife, to be assessed for *ad valorem* taxes when under identical circumstances the two lots referred

to in the above quotation are completely exempted from both benefit assessment and *ad valorem* taxes.

Respectfully submitted,

ERCOLE LEONARDO,
ELSIE IRENE LEONARDO,
Two of the Appellants and
Cross-Appellees.

GEORGE T. BURROUGHS,
GINSBERG & GINSBERG,
HYMAN GINSBERG,
Solicitors for Appellants and
Cross-Appellees,
914-16 Garrett Building,
South & Redwood Streets,
Baltimore 2, Maryland.

This is to certify that a copy of the foregoing Motion for Reargument was mailed to H. Warren Buckler, Jr., Esquire, 301 North Charles Street, Baltimore 1, Md., and a copy was also mailed to Wm. O. E. Sterling, Esquire, Leonardtown, Md. on the 13th day of August, 1957.

GINSBERG & GINSBERG,
By /s/ HYMAN GINSBERG,
Solicitors for Appellants and
Cross-Appellees.

GEORGE T. BURROUGHS,
Solicitor for Appellants and
Cross-Appellees.

September 24, 1957

Motion for reargument denied.

/s/ FREDERICK W. BRUNE,
Chief Judge.

Acts of General Assembly of Maryland, 1953, Chapter 277 Code 1957 Supplement Art. 25, Secs. 156 to 162.

* * * * * *

WHEREAS, the General Assembly of Maryland, by Chapter 66 of the Acts of the Regular Session of 1950, authorized the several sets of County Commissioners of this State to set up Special Taxing Districts for erosion prevention work; and

WHEREAS, subsequent decisions by the Court of Appeals of Maryland have indicated the possibility that said Chapter 66 of 1950 might have been invalid as a possible subject for consideration at the 1950 Session of the General Assembly by reason of not having been state-wide in its scope and application; and

WHEREAS, it is desirable to remove any doubts as to the possible effectiveness of these powers of the several Boards of County Commissioners by repealing said Chapter 66 of 1950 and enacting the provisions thereof in a new bill; and

WHEREAS, it is also desirable to validate and confirm any action which may have been taken or any things done by any Board of County Commissioners purporting to act under the terms and authority of said Chapter 66 of 1950; therefore

* * * * * *

156. Territory within each and every sub-division of land in any county of this State, sub-divided for residential and business uses, and abutting or bordering upon the Chesapeake Bay tributaries, or upon any other stream or body of water in this State, as shown by the plats of said respective sub-divisions recorded among the Land Records of said county, be, and the same are, hereby respectively created separate Taxing and Assessment Districts; and each District, for the purposes of this sub-title, shall bear the name of the sub-division out of which it is created.

157. (a) The County Commissioners of the County are hereby authorized and empowered to act as the District Council for each of said Taxing and Assessment Districts, and, in carrying out the provisions of this sub-title, to use

all the applicable power and authority vested in them by existing law and by this sub-title.

* * * * * *

158. (a) Upon the written application or petition of 75 per cent of the property owners in any of said District, requesting erosion prevention works, the County Commissioners, acting as District Council for any of such districts, are hereby authorized and empowered to construct erosion prevention works in said districts to prevent erosion by the Chesapeake Bay and tributaries, or by any other stream or body of water in this State. The said County Commissioners, acting as District Council, shall provide the necessary engineering agency for the preparation of plans, specifications, contracts and supervision.

(b) For the purpose of providing funds for the purchases and condemnations authorized by Section 168 hereof, for the construction of erosion prevention works in or for any of said Taxing and Assessment Districts, the said County Commissioners, acting as District Council for the district in or for which erosion prevention works are to be constructed, are hereby authorized and empowered to borrow money upon the faith and credit of the Taxing and Assessment District to be so protected in such amount or amounts as it may deem necessary to complete the construction of such erosion prevention works in or for such Taxing and Assessment District. The money so borrowed shall bear interest at a rate or rates to be fixed by said County Commissioners, not exceeding six per centum per annum, payable semi-annually, and shall be secured by notes, certificates of indebtedness or bonds issued by the County Commissioners, acting as District Council for each district to be so improved, upon the faith and credit of such Taxing and Assessment District. Said notes, certificates of indebtedness or bonds shall be and remain exempt from State, County and municipal taxation. Said notes, certificates of indebtedness or bonds shall be made payable within fifteen years after the issuance thereof. Said notes, certificates of indebtedness or bonds shall be issued under the hand and seal of the County Commissioners, acting as Dis-

trict Council for the district for which said notes, certificates of indebtedness or bonds are issued, and said bonds, only, shall be guaranteed as to the payment of principal and interest by the County Commissioners of the County, which guaranty shall be endorsed on each of said bonds in the following language: "The payment of interest when due and the principal at maturity is guaranteed by ..... County, Maryland." Such endorsement shall be signed on each of said bonds by the president and attested by the clerk of the Board of County Commissioners of said county, and its corporate seal thereto affixed, within twenty days after said bonds are ready for endorsement. "Notwithstanding the provisions of Sections 34, 35, and 36 of Article 31 of the Annotated Code of Maryland (1951 Edition) the notes, certificates of indebtedness, or bonds may be sold either at public sale or by private negotiation, in the discretion of the County Commissioners of the county issuing the same, acting as a District Council."

(c) The said notes, certificates of indebtedness or bonds shall be issued so as to mature serially and at such times as said County Commissioners shall determine but not exceeding fifteen years in any case.

* * * * * * *

160. (a) After any erosion prevention works, or part thereof determined to be constructed, shall have been completed in or for any Taxing and Assessment District, said County Commissioners, acting as District Council for such district, are empowered and directed to fix and levy a benefit charge upon all real property in said district benefited by the said erosion prevention works. Before proceeding to assess such benefits it shall first notify the owners of real property in such Assessment District that it proposes to make an assessment of benefit against their real property for such erosion prevention works, and that upon a day certain to be named therein a hearing will be granted such owners at a place designated therein. Said notice of the proposed assessment, as far as practicable, shall be mailed to each property owner in said Assessment District by placing the same in an envelope addressed to

his last known address and depositing the same, postpaid, in a United States Post Office, and by publication thereof once a week for two successive weeks in a newspaper of general circulation published in the County.

(b) After said hearing has been granted, said Commissioners, acting as such District Council, shall determine the benefits accruing to each of the lots or parcels of land in said Assessment District from the construction of said erosion prevention works and shall fix and levy a benefit charge upon each lot or parcel of land in said Assessment District to the extent it is benefited by the construction of said erosion prevention works or part thereof. Said benefit charge shall be a lien upon the real property against which it is assessed and shall be paid annually as county taxes are required to be paid, by all such lots or parcels of land in such district for a period of years co-extensive with the period of maturity of the notes, certificates of indebtedness or bonds out of the proceeds of which such erosion prevention work was done.

161. (a) For the purpose of providing additional funds to pay the semi-annual interest on such notes, certificates of indebtedness or bonds, and the principal thereof, of each of said districts, when and as they mature, and providing all the funds necessary to pay the costs and expenses of each district to carry into effect the provisions of this subtitle and the entire cost of repairing and keeping in repair in each district the erosion prevention works constructed therein, the County Commissioners of the County, acting as District Council for each of such districts, shall annually levy against all the assessable property in each district so improved, a tax which, with the money collected from the benefit charges, will be sufficient to meet the interest on said notes, certificates of indebtedness or bonds as it becomes due, the principal thereof when and as they mature, and to pay the entire cost of all necessary expenses of each district to carry into effect the provisions of this sub-title and the entire cost of repairing and keeping in repair the erosion prevention works constructed in each district, including reimbursement to the County Commis-

sioners of the County, acting as District Council for each district, of the expenses incurred by them, not to exceed Two Hundred Dollars each, annually, in the inspection of the various bulkheads, and in the performance of other duties required in the administration of the provisions of this sub-title. The said County Commissioners, acting as District Council for each district, shall, each year, prior to its annual levy, determine the number of cents per one hundred dollars necessary to raise the amount of money so required, and each year, in its annual levy shall levy the tax above mentioned until all of said notes, certificates of indebtedness or bonds, and the interest thereon, and all other indebtedness incurred in carrying into effect the provisions of this sub-title, shall have been paid. Thereafter, it shall levy a tax sufficient only to keep in repair said erosion prevention works.

(b) Said tax shall be levied and collected as county taxes now are, or may hereafter be, by law levied and collected, and shall have the same priority rights, bear the same interest and penalties and in every respect be treated the same as county taxes. The taxes so levied shall be collected by the taxing authority of the County and every sixty days he shall remit the whole amount of taxes so collected from each district to the County Commissioners, acting as District Council for such district. The money so received shall be deposited in such bank or banks in the County as the County Commissioners shall determine, to the credit of said County Commissioners as District Council for the district from which said moneys were collected, at the rate of interest paid for county funds. Out of the benefit charges and taxes so collected, said County Commissioners, acting as District Council for the district paying said benefit charges and taxes, shall first pay the interest on the notes, certificates of indebtedness or bonds issued for the benefit of said district as it matures, and such notes, certificates of indebtedness or bonds when and as they mature. Out of the remaining money so collected by taxes, the County Commissioners shall then pay all other indebtedness incurred in carrying out the provisions of this sub-

title and the cost of keeping in repair the erosion prevention works in such district.

(c) Should receipts from said benefit charges and taxes for any district be inadequate to meet said payments in any year by reason of default or otherwise, such deficiency shall be added to the next year's tax levy for such district, but nothing herein contained shall be construed to release a county, guaranteeing any bonds hereunder, from its obligation under such guaranty to levy ad valorem taxes upon assessable property within the corporate limits of said county sufficient in rate and amount at any time to pay the maturing principal and interest of any such bonds, should the aforementioned benefit charges and district taxes prove insufficient for said purpose for any reason.

SEC. 3. *And be it further enacted,* That any action taken or things done by any Board of County Commissioners of this State, while acting under the scope and authority of said Chapter 66 of the Acts of 1950, shall be and the same are hereby ratified and confirmed as having been done legally.

SEC. 4. *And be it further enacted,* That this Act shall take effect June 1, 1953.

SUPREME COURT, U.S.
JOHN T. FEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 576

ERCOLE LEONARDO AND ELSIE IRENE LEONARDO,
Petitioners,

VS.

BOARD OF COUNTY COMMISSIONERS OF ST. MARY'S COUNTY, MARYLAND, A BODY CORPORATE AND POLITIC, AND CONSTITUTING THE DISTRICT COUNCIL FOR "TALL TIMBERS-ON-THE-POTOMAC DISTRICT", A SEPARATE TAXING AND ASSESSMENT DISTRICT, ST. MARY'S COUNTY, MARYLAND, AND J. FRANK BAILEY, TREASURER FOR ST. MARY'S COUNTY, MARYLAND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM O. E. STERLING,
Leonardtown, Md.,
H. WARREN BUCKLER, JR.,
301 N. Charles Street,
Baltimore 1, Md.,
Attorneys for Respondents.

The Daily Record Co., Baltimore 1, Md.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENTS IN OPPOSITION

Items (a), (b) and (c) of Paragraph 1 of Rule 40 of this Court are not included in this brief, the Respondents being satisfied with the presentation of these items by the Petitioners.

QUESTIONS PRESENTED

Petitioners in their framing of the questions presented by their petition make a misstatement of fact in paragraph 1 (Pet. 5) when they refer to Laws of Maryland 1950, c. 66, as being unconstitutional. The General Assembly of Maryland first made provision by said Act for the creation of Taxing and Assessment Districts for erosion prevention works and for the powers and duties of such Districts. Subsequently, decisions of the Court of Appeals of Maryland in *Funk v. Mullan Contracting Co.*, 197 Md. 192, 79 A. 2d 152 (1951) and *Washington Suburban Sanitary Commission v. Buckley*, 197 Md. 203, 78 A. 2d 638 (1951) made it appear probable that the subject matter of Laws of Maryland 1950, c. 66, should not have been considered at the thirty-day legislative session of the General Assembly in 1950 as being in violation of Section 15 of Article III of the Constitution of Maryland. That Section provides, in part, that at the 30 day session in even years, the General Assembly shall consider no bills other than (1) bills having to do with budgetary, revenue and financial matters of the State Government, (2) legislation dealing with an acute emergency, and (3) legislation in the general public welfare.

The General Assembly took note of the probable constitutional deficiency at its next regular session following publication of the above-cited cases and enacted Laws of Maryland 1953, c. 277, validating and confirming any action taken or any things done by any Board of County Commissioners purporting to act under the authority of the Laws of Maryland 1950, c. 66. Laws of Maryland 1953, c. 277, then provided for the creation of Taxing and Assessment Districts for erosion prevention works and for the powers and duties of these Districts. However, Laws of Maryland

1950, c. 66, has never been declared unconstitutional, and the court below specifically stated that it was unnecessary to pass on the constitutionality of the 1950 Act (Pet. 24).

Respondents submit that there are only the three following questions involved in this case and that they have been answered previously by decisions of this Court and other courts:

1. Is there a denial of due process under the 14th Amendment of the Constitution of the United States when a State Legislature ratifies by subsequent legislation an ultra vires act of a political sub-division, which act the Legislature could originally have authorized, and such ratification disturbs no vested rights?

2. Is there any denial of due process when County Commissioners, pursuant to legislative authority, exercise their discretion in dividing the cost of a public improvement, including interest on indebtedness incurred for such improvement, between an ad valorem tax upon all property within the taxing district and a special benefit assessment on property specially benefited, where no charge of arbitrary or capricious action by the County Commissioners has been made?

3. Is there any denial of equal protection of the law under the 14th Amendment of the Constitution of the United States where County Commissioners, in the exercise of discretion conferred upon them by the State Legislature, define a district to be benefited by a public improvement so as to include therein property which is enclosed by the taxing district boundaries and is already so improved, while excluding from the taxing district property on the periphery thereof and already having such improvement?

STATEMENT OF THE CASE

The facts which led to this present litigation are well set forth in the opinion of the lower court (Pet. 17-21). The Court of Appeals of Maryland decided that Petitioners, who are owners of Lots Nos. 43 and 44 in the erosion prevention district of "Tall Timbers on the Potomac" (Ex. 4, Record Extract 55-56), should not be required to pay the benefit charge fixed and levied on their lots so long as the taxing authority had not acquired ownership of or an easement in Petitioners' privately owned seawall in front of the said lots, but that Petitioners were liable for the payment of the ad valorem tax duly assessed pursuant to the authority of Laws of Maryland 1953, c. 277 (Annotated Code of Maryland, 1957 Cum. Supp., Art. 25, Secs. 156-162). Lots Nos. 43 and 44 face the Potomac River and are bounded on the other three sides by lots in the Tall Timbers on the Potomac District.

ARGUMENT

I. Petitioners argue that the General Assembly of Maryland in enacting Laws of Maryland 1953, c. 277, was without authority to ratify and confirm action taken pursuant to provisions of the Laws of 1950, c. 66. Between the passage of the two Acts a substantial portion of the construction at Tall Timbers on the Potomac had been completed, although bonds had not been issued nor taxes and benefit charges levied (Pet. 24).

It has long been held in Maryland that, unless there is a disturbance of, or interference with, vested rights, the legislature possesses the power to pass a retroactive law to make valid an ultra vires municipal contract, if the contract is one which the legislature might originally have authorized. *O'Brian v. County Commissioners*, 51 Md. 15 (1879). See also *C. and P. Tel. Co. v. Balto. City*, 89 Md. 689, 714,

44 A. 1033 (1899); *Water Co. v. Havre de Grace*, 150 Md. 241, 253, 132 A. 768 (1926).

The *O'Brian* case followed the decision in *Thomson v. Lee County*, 3 Wall. 327 (1865) which has been consistently followed. *Anderson v. Santa Anna*, 116 U. S. 356, 6 S. Ct. 413, 29 L. Ed. 633 (1886); *Bolles v. Brimfield*, 120 U. S. 759, 7 S. Ct. 736, 30 L. Ed. 786 (1887); *City of Allegany v. Consumers' Power Co.* (C. A. 6, 1934), 71 F. (2d) 477, cert. denied 293 U. S. 586, 55 S. Ct. 100, 79 L. Ed. 681. This doctrine is clearly correct and there is no need for review by this Court.

II. Petitioners next contend through several questions that the levy of an ad valorem tax against their lots is improper because no benefits are conferred on their lots by the erosion prevention works constructed by the County Commissioners, and that there is a violation of the due process clause of the 14th Amendment of the Constitution of the United States because a portion of the ad valorem tax includes interest payable on the issue of bonds sold to pay for the erosion prevention works.

Petitioners' argument fails to distinguish between the nature of a benefit assessment and that of an ad valorem tax. Laws of Maryland 1953, c. 277, provided for (a) a benefit charge on the properties benefited; (b) an annual tax on all the assessable property in the taxing district, and (c) if necessary, a county-wide ad valorem tax. There is nothing unusual in this procedure, it having been approved by the Court of Appeals of Maryland in *Dinneen v. Rider*, 152 Md. 343, 136 A. 754 (1927), where it was pointed out that the benefit assessment rests upon the theory of benefit and is substantially different in kind from the ad valorem taxes imposed throughout the district or throughout the County.

The court below has quite properly ruled that Petitioners are not required to pay the benefit charge fixed and levied so long as ownership of or an easement in their private seawall has not been acquired by the County Commissioners. But it is quite another matter to resist the ad valorem tax merely because a direct benefit cannot be attributable to the imposition of the tax. In *Morton Salt Co. v. City of South Hutchinson* (C. A. 10, 1949), 177 F. 2d 889, the appellant protested payment of an ad valorem tax levied on all property in the City to pay for the cost of a city water system financed by a bond issue. Appellant argued it would receive no benefit because it had its own private water system and would not even be connected with the proposed city water supply. In denying relief to appellant, the Court pointed out that, although constitutional due process requires a municipality to give something for its exactions, it does not require *a quid pro quo*, i.e. a return in kind, or even an equivalent, for such exactions. The concurring opinion points out (p. 893) that "ad valorem taxes are not based on benefits but on value of taxable property. Their burdens are not necessarily in proportion to benefits and need not be to meet the constitutional test of validity. They must be uniform and must not be palpably arbitrary or discriminatory . . ." To the same effect is *Hydrocarbon Production Co. v. Valley Acres W. Dist.* (C. A. 5, 1953) 204 F. 2d 212, cert. denied 346 U. S. 825, 74 S. Ct. 44, 98 L. Ed. 350.

The benefit charges assessed against the lots in the District known as Tall Timbers on the Potomac cover only the cost of the erosion prevention works constructed (Record Extract 49-51), and Petitioners are not required to pay any portion of the cost of construction at this time. The mandate of the court below that they pay the ad valorem tax levied against their lots is dictated by the fact that the

ad valorem tax is uniformly applicable to all of the lots within the taxing district and such tax is based upon valuation and not upon benefits received. The levy of this ad valorem tax does not violate Article 15 of the Declaration of Rights of the Constitution of Maryland, providing that "all taxes . . . shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy. . . ."

Petitioners do not challenge the fact that the issuance of bonds was for a public and not a private purpose. Undoubtedly, the prevention of erosion of abutting properties on the Potomac River was in the public interest. *McQuillin, Mun. Corp.* (3rd Ed.), Sec. 43.31. It was, therefore, within the constitutional power of the General Assembly of Maryland to have provided for an ad valorem tax in the erosion district to pay for the construction of the erosion prevention works, as well as the interest on the bonds and the maintenance and repair charges on the erosion prevention works. This method of taxation would have placed the burden of taxation uniformly on all taxpapers, as constitutionally required, but that burden would have been shared by taxpayers receiving no direct and immediate benefit from the project. Instead of following this course, the General Assembly of Maryland chose to place the heaviest tax burden on those who would receive direct benefits by providing for a benefit charge to cover the cost of the project. Thus, the method chosen is in favor of the ad valorem taxpayer, and he should not now be permitted to complain of the beneficence of the General Assembly in reducing his potential tax burden.

Finally, Petitioners have cited no authority which would require the interest on money borrowed for a public im-

provement to be included in the benefit charge and excluded from the computation of the ad valorem tax. It appears that the assessment may include interest but Respondents have been unable to find any mandatory authority to such effect. 63 *C. J. S., Mun. Corp.*, Sec. 1411(h), p. 1201.

It is evident that Petitioners received some benefit from the construction of the erosion prevention works in the District in which their lots are located, even though they owned their own seawall. This is so because the seawall belonging to the District is tied in on both sides of Petitioners' seawall and, thus, the river is prevented from encroaching around either end of Petitioners' seawall (Ex. 4, Record Extract 54-55; 20-21). Furthermore, jetties were constructed by the County Commissioners in front of the Petitioners' seawall in order to trap sand and protect the Petitioners' seawall (Record Extract 111-112).

III. Petitioners' final argument is that the equal protection clause of the 14th Amendment has been violated because two lots at the extreme southern end of the Tall Timbers subdivision were not included in the special Taxing District. These lots, shown as lots 49 and 50 (Ex. 4, Record Extract 54-55), were not included because at the time of the creation of the Taxing District the lots were protected by seawalls considered by the County Surveyor in 1951 to be adequate (Pet. 34; Record Extract 178; Ex. 4, Record Extract 54-55). The court below carefully examined the pertinent sections of the Act of 1953, c. 277 (Pet. 32) and concluded that the County Commissioners had ample authority under the Act to designate all or part of any recorded subdivision as the special Taxing District which should bear the benefit and ad valorem taxes authorized by the Act of the General Assembly. It is axiomatic that lands to be assessed may be determined either by the

legislature itself or the legislature may leave the classification to the determination of local political subdivisions. *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 S. Ct. 625, 45 L. Ed. 879 (1901); *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 36 S. Ct. 58, 60 L. Ed. 266 (1915). Furthermore, there is no requirement, as Petitioners argue, that there must be a territorial uniformity in order to have compliance with the equal protection clause of the 14th Amendment. This Court has stated on several occasions that the requirement under the Amendment relates to equality between persons as such rather than between areas. *Salsburg v. Maryland*, 346 U. S. 545, 74 S. Ct. 280, 98 L. Ed. 281 (1954); *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989 (1879). More recently this Court has said in *Walters v. City of St. Louis*, 347 U. S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954) at page 237 (U. S. Reports):

> ". . . Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. . . ."

Respondents submit that, in the enactment of Laws of Maryland 1957, c. 277, the General Assembly of Maryland followed the principles established by this Court with respect to the application of the equal protection clause of the 14th Amendment and that the County Commissioners, duly delegated to establish the special Taxing District, did not make any arbitrary, unreasonable or discriminatory classification in setting up the Taxing District. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369 (1896); *Wampler v. LeCompte*, 282 U. S. 172, 51 S. Ct. 92, 75 L. Ed. 276 (1930); *U. S. Mortgage Co. v. Matthews*,

293 U. S. [illegible] 55 S. Ct. 168, 79 L. Ed. 299 (1934); *Tatlebaum v. Pante. Mj . Co.*, 204 Md. 360, 104 A. 2d 813 (1954).

CONCLUSION

The de[illegible]ion of the Court of Appeals of Maryland is correct, and it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM O. E. STERLING,
Leonardtown, Md.,
H. WARREN BUCKLER, JR.,
301 N. Charles Street,
Baltimore 1, Md.,
Attorneys for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 576

ERCOLE LEONARDO and ELSIE IRENE LEONARDO,
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v.

BOARD OF COUNTY COMMISSIONERS OF ST. MARY'S COUNTY, MARYLAND, a body corporate and politic, and constituting the District Council for "Tall Timbers-on-the-Potomac District", a separate taxing and assessment District, St. Mary's County, Maryland, and J. FRANK BAILEY, Treasurer for St. Mary's County, Maryland, *Respondents.*

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

THURMAN HILL,
Counsel for Petitioners,
1025 Connecticut Ave., N. W.
Washington 6, D. C.

BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Since the filing of the petition for writ of certiorari and even after the decision of your Honorable Court denying the writ, certain actions have been taken by the respondents, the Board of County Commissioners of St. Mary's County, Maryland, in which it will be

clearly demonstrated that the respondents have either misinterpreted the decision of the Court of Appeals of Maryland or intentionally construed it in such a way as to entirely circumvent the obvious scope and intention thereof. This misconstruction, if not corrected and acted upon as now proposed, would lead to the confiscation of the property of the petitioners in violation of the Fourteenth Amendment of the Constitution of the United States.

The Board of County Commissioners, through its legal counsel, has indicated by oral conversations and by letter that the said Board intends to purchase or condemn the sea wall that was constructed and owned by the petitioners prior to the establishment of the sea wall District. The basis upon which it proposed to acquire this sea wall frontage of 100 ft., which is owned by the petitioners, is that it would reimburse them for the original cost of approximately $2,000.00 or less for the construction of the said wall. The Court should bear in mind that although the petitioners' wall was not taken by the said Board at the time of construction of the erosion project it, being deemed adequate, was integrated into and incorporated within the District. The Board now proposes to take the wall and assess the petitioners through a benefit tax the sum of $3,030.00, which was arrived at as being the amount this 100 ft frontage of sea wall would have cost the Board had it constructed the sea wall in the manner in which it did construct the sea wall adjoining the petitioners on either side.

All of the testimony in the record was to the effect that the 100 ft. of sea wall that had been constructed by the Leonardos, the petitioners, was in good condition. As a matter of evidence, after the sea wall in

the District (excepting the Leonardos' sea wall) had been constructed, "Hurricane Hazel" came along and weakened a large section of the wall that had been constructed by the County; some of it being practically destroyed while the sea wall built by the petitioners stood firm and secure against the ravages of this hurricane.

On January 22nd, 1958 the County Commissioners, by letter to counsel for the petitioners, advised the petitioners that they would pay "a fair price for his sea wall and that is as far as they can go in this matter." Counsel for petitioners by telephone thereafter, inquired of counsel for the Board of County Commissioners what they meant by a fair price for the sea wall. Counsel for the Commissioners stated that this matter had been discussed by the Commissioners in a meeting held on January 21st 1958 and that they were of the opinion that a fair price would be the out-of-pocket cost incurred by the petitioners in constructing the 100 ft. sea wall. (Not the fair and reasonable cost of replacement nor construction at time of taking, nor even the equivalent of cost to the Commissioners of similar wall constructed in the project as might have been expected and which would have been acceptable to the petitioners.) In the affidavits attached to this motion, said affidavits having been executed by the petitioners and counsel, it is recited in the affidavit of petitioner that the total cost of the sea wall to him was less than $2,000.00; the reason ,of course, for the petitioners being able to construct their sea wall at a substantially lower cost was due partly to the fact that it was constructed at a time when prices for labor and material were not as high as they were in 1953, and petitioner contracted, supervised and labored thereon himself.

The respondents state frankly that they are relying upon the decision of the Circuit Court of Appeals in Maryland as authority to acquire the sea wall of the petitioners and if he refuses to accept his out-of-pocket costs for constructing the wall it will follow, naturally, that the Commissioners will proceed in an action of condemnation to acquire the petitioners sea wall.

In short, the Board would place a value of $2,000.00 or less on the wall for purposes of taking and immediately thereafter place a value in excess of $3,000.00, plus costs and interests for purposes of assessment.

It is the contention of the petitioners that neither the Circuit Court of Maryland nor the Court of Appeals ever intended, under these circumstances, to give to the respondents the power of condemnation of the existing sea wall but that said power was expressly granted to them for the purpose of taking, by condemnation proceedings, land belonging to the petitioners for the purpose of constructing another or additional sea wall; not for the purpose of buying the existing sea wall. The law under which the County Commissioners set up a special taxing district for the prevention of erosion in St. Mary's County provides that

> "Whenever it shall be deemed necessary by said County Commissioners, acting as a District Council for any of said Taxing and Assessment Distracts, to take or acquire any land, structures or buildings, either in fee or as an easement, for the construction, extension or maintenance of any erosion prevention works to prevent erosion by Chesapeake Bay and tributaries, or by an other stream or body of water in this State, in any of said Taxing and Assessment Districts, it may purchase the same from the owner or owners, or, fail-

ing to agree with the owner or owners thereof, may condemn the same, and any interest of any tenant, lessee or other person therein, by proceedings in the Circuit Court for the County as now provided by Article 33A of the Annotated Code of Maryland."

The Court will observe that under this law the County Commissioners have the power to take or acquire any land, structures or buildings "* * * for the *construction*, extension or maintenance of any erosion prevention works." (Italics supplied) It was never intended, under this Act, that the County Commissioners would acquire a seaworthy sea wall which had been constructed by the petitioners, and which had been fully paid for by them. This conclusion is supported by the following statement from the opinion of Judge J. Dudley Digges, of the Circuit Court for St. Mary's County.

"The Court, however, reaches a different conclusion as to the assessment of benefits against the Leonardo lots. As applied to these lots, it is apparent from the testimony that Leonardo had some years prior, constructed a wall in front of his property which was obviously in such condition that the District Council and the Engineers felt it was not necessary to reconstruct a new wall to replace it. In fact, the testimony shows that the new wall, constructed under the authority of the legislation above referred to, tied into this wall, and Leonardo's property received only an incidental benefit from the wall constructed. To require him now to pay a front foot benefit tax would in effect mean that he would pay twice for the wall which he constructed and which is now owned by him and serves as a benefit not only to his property, but to the entire area. It will be noted that the County Commissioners did not attempt to purchase this

wall in front of the Leonardo property, now have no interest therein, and in fact have utilized it for the purpose of preventing water from coming around the end of the newly constructed wall. I am not unmindful of the fact that Leonardo has benefited to some extent at least by the construction of the new wall, since it prevents water from washing around the end of his wall; nevertheless, the benefit tax as assessed against him is disproportionate to the benefit his lots have received, and the action of the County Commissioners in assessing the benefits against this property as they have the other lots, is therefore arbitrary and unreasonable."

Please note that the Court said "to require him now to pay a front foot benefit tax would in effect mean that he would pay twice for the wall which he constructed and which is now owned by him and serves as a benefit not only to his property but to the entire area." And further on the Court states "* * * and the action of the County Commissioners in assessing the benefits against this property as they have the other lots, is therefore arbitrary and unreasonable."

Under the opinion and decree of the lower court the land and property of the petitioners could not be assessed for a tax to pay for the cost of the wall. That, of course, is logical because the petitioners, with their own time and money, had const. ed the wall. The lower court did hold that the petitioners should pay, as an added tax, what it called an "ad valorem tax" to cover the payment of interest on the bonds which had been issued by the County Commissioners to pay for the entire wall and also for the costs of the repairs of maintaining the entire wall. It is difficult for petitioners to understand why they should be assessed

interest on the bonds where the proceeds were used to pay for the costs of the entire wall and where it is agreed by all parties that the District did not pay for the cost of the 100' wall frontage constructed by the Leonardos. The Leonardos concede that it would be proper for them to be assessed for the costs of any repairs which were made to the wall.

Other than that the opinion of the lower court, which should not have provided that the petitioners be assessed for interest, is proper and just.

However, we feel that the Court of Appeals of Maryland went beyond the facts and the law and, as a result, the petitioners are now faced with action by the County Commissioners of St. Mary's County which will confiscate their property in violation of the Fourteenth Amendment.

CONFLICT OF OPINIONS

So that the Court may clearly understand the differences in the opinions between the lower court and the Appellate Court we now quote from the opinion of the Court of Appeals of Maryland the pertinent section of its opinion as it applies to the petitioners.

> "We come now to the cross-appeal. As the Leonardos had previously constructed a private sea wall in front of their lots, the appellees concede the chancellor was correct in decreeing the two lots owned by the Leonardos were not properly subject to the benefit tax. However, they request that the decree be modified to the extent that if the commissioners acquire an easement in, or ownership of, the private sea wall of the Leonardos, the commissioners *thereafter* could collect the benefit tax from the Leonardos or the subsequent owners of the two lots. We think the decree should be so

modified. As the decree now reads, the commissioners are perpetually enjoined from collecting the benefit tax on these two lots. If, *in the future*, the commissioners acquire an easement in, or ownership of, the sea wall, there is no just reason why they should be prevented from then collecting the assessment." (Italics supplied).

You will note that the Court of Appeals conceded that Judge Digges, of the lower court, was correct, in decreeing that the two lots, owned by the Leonardos, were not properly subject to the benefit tax. Had the Court stopped at that point there would have been no confusion or misinterpretation as to the meaning of the decision of the Court of Appeals, but the Court went on to say that "If the Commissioners acquire an easement in, or ownership of the private sea wall of the Leonardos, the Commissioners *thereafter* could collect the benefit tax from the Leonardos or the subsequent owners of the two lots." Then the Court adds "If, *in the future,* the Commissioners acquire an easement in, or ownership of the sea wall, there is no just reason why they should be prevented from then collecting the assessment."

RECENT ACTS OF RESPONDENTS

As heretofore stated, since the denial of the writ of certiorari by your Honorable Court, the Commissioners, by oral statement and in writing, have indicated that they propose to buy or condemn the sea wall of the petitioners. It is the contention of the petitioners that it was the intention of both courts not to assess the petitioners with the benefit tax on the sea wall which they constructed and own as long as they, the Leonardos, were in possession of the property, and this right also extended to the subsequent owners.

The Leonardos concede that if a hurricane or some other act of God, or perhaps act of war, demolished the present seaworth sea wall which they had constructed, or for some other valid reason the County Commissioners felt it necessary to build an additional wall on the land of the petitioners, then the County Commissioners would have the authority, under the law, to acquire, either by purchase or condemnation, the *land*, of the Leonardos necessary *for the construction* of the new or additional wall. This, of course, was clearly set forth in the opinion of the lower court and, as a result of that opinion, the County Commissioners have not assessed the Leonardos for either the benefit or ad valorem tax since 1954. However, they will do so unless the opinion of the Court of Appeals is clarified as the Commissioners have the power to make these benefit tax payments retroactive to 1954.

Your petitioners have learned, too, since the denial of the writ, by personal inspection of the records of the County Treasurer of St. Mary's County, Maryland, that all of the owners in the sea wall district have not been assessed, that no money has even been spent for repairs and that although a substantial amount of money has been received since 1954 from benefit tax payments, that the assessments for interest have remained at the same rate. Apparently the Commissioners are of the opinion that they have the right to take these steps even though the effect results in discrimination and confiscation of the property of those who pay the full benefit and ad valorem taxes. These facts were not before the Circuit Court or Court of Appeals of Maryland.

In support of the statements in the foregoing paragraph, as late as January 25th, 1958 the petitioner,

Ercole Leonardo, checked the assessment books in the office of the Treasurer for St. Mary's County, Maryland, at Leonardtown, Maryland, in connection with the separate taxing and assessment district known as Tall-Timbers-on-the-Potomac District. (Affidavit of Ercole Leonardo attached hereto.) His investigation revealed the following facts:

1. No assessment has been levied against Lots 49 and 50 in the first section of the subdivision or against the 47' directly south of lot 50.
2. No assessment has been levied against the 15 roadways, each being 25' wide, title of which vests in the name of Henry J. Juenemann.
3. No assessment has been levied against Lot 9 in the original subdivision.
4. No assessment has been levied against Lots 17 and 37 in the original subdivision.
5. No assessment has been levied against Lot 25 in the 2nd subdivision.
6. No assessment has been levied against Lot 38 in the original subdivision.
7. No assessment has been levied against Lot 57 in the first subdivision.
8. At no point have assessments been made that total $130,410.00 as set forth in resolution dated 10-13-53."

The records checked were for the period 1954 through 1957.

This clearly shows that the respondents, by failing to assess all the tax payers within the District, are

taking the property of the petitioners in violation of the Fourteenth Amendment. To illustrate, in order to retire the bonds according to the terms and conditions of the bond issue, the sum of $6,666.00 must be collected each year from the front foot benefit tax owners. In carrying out the provisions of the terms and conditions of the bond issue the Commissioners assessed each front foot a definite amount sufficient to raise the required amount of $6,666.00 and assessed and ad valorem tax of $3,250 per annum against the project of which $2,750.00 was interest the balance of $500 representing repairs. Had the Commissioners properly assessed all of the property in the District, excluding petitioners, the amount so collected would have reduced the principal of the bond issue and, as a consequence, there would have been a corresponding decrease in the amount of interest assessed. Due to the failure on the part of the respondents to properly assess and collect all of the tax the respondents have not reduced the amount of interest from 1954 to 1957, inclusive, and are still assessing, as late as January 25th, 1958, the amount of $2,750.00 as interest. The reason the writer cites these dull figures is to show the Court that the respondents have misinterpreted the decision of the Circuit Court of Appeals and unless this decision is clarified will attempt to assess and collect from the petitioners for the period beginning in 1954 and thereafter, not only the benefit tax but taxes for repairs, maintenance and excessive interest. This certainly will result in taking the property of the petitioners without due process of law.

Since the petition for the writ of certiorari was denied by your Honorable Court counsel for the petitioners was advised by counsel for the respondents

(affidavit of Thurman Hill attached hereto) that the respondents had assessed all of the lots in the District which had been protected by the sea wall which had been constructed by the respondents out of the proceeds derived from the sale of the bond issue. Apparently counsel for the respondents was mistaken as the respondents did construct a new sea wall in front of Lots 49 and 50 in the original District plus a 47′ lot which extended south of Lot 50. The records show that no assessment has been made by the respondents against Lots 49, 50 or the 47′ extension. Under the decision of the lower court these lots were included for assessment but were excluded by the Court of Appeals on the theory that these lots were either not in the original plat or that there had been an existing wall in front of Lots 49 and 50 and the 47′ extension, making it unnecessary for the respondents to construct a new wall. The Court of Appeals was completely in error in its finding and decision in this respect. Counsel feels that the reason for the mistake on the part of the Court of Appeals came about as follows.

William L. Bowman, County Surveyor of St. Mary's County, testified that he made a survey in regard to the construction of a bulkhead and jetties on the Tall Timbers waterfront. This was as of February 26th, 1951 before the respondents constructed the sea wall which is involved in this litigation. The witness, Bowman, testified, "Then there was no wall at all until you reached the northern sideline of Lot 49 and then the wall was continuous on down out of the subdivision." At no time did Bowman ever testify that this continuous wall was constructed in such fashion as to prevent erosion. The Court of Apeals apparently assumed

that this was what the surveyor meant by this testimony. As a matter of fact, the wall in front of Lots 49 and 50 and the 47′ extension further south was in very poor condition and the respondents did construct a new sea wall in front of these lots and the 47′ extension out of monies derived from the sale of the bond issue. This statement is supported by the testimony of Mr. Chapman Thompson, the Resident Maintenance Engineer of the Maryland State Roads Commission, who had been appointed as an inspector by the County Commissioners of St. Mary's County in connection with the construction of the wall which was performed on Tall-Timbers. During the course of the construction he inspected the wall on an average of three times a week. Mr. Thompson testified, "On the south end of the sea wall it was necessary to continue the wall (new wall) 47′ to tie in with the existing wall that was built there to prevent erosion around the wall that we built."

"Question: 47′ to the south. Here is your water side. Using Lot 50 in the front tier of lots, how far from the southwest corner of Lot 50 does the wall extend?"

"Answer: 47′.

"Question: And it continues from that point across Lots 50 and 49 as shown on this plat and then on northward to Leonardos' wall, and from thence on up to Juenemann's. Is that correct?"

"Answer: Yes, sir."

It should be clear to your Honorable Court that from this testimony the respondents did construct the sea wall in front of Lots 49 and 50 and the partial lot of 47′ and that it was plainly error for the Circuit Court

of Appeals to exclude these lots from benefit tax assessment and ad valorem assessment. The only reason that the counsel can think of which caused the Circuit Court of Appeals to exclude this frontage of 147' from the District was that it misread or misinterpreted the testimony of the County Surveyor, Mr. Bowman, assuming that when the surveyor said that there was a continuous wall in front of lots 49, 50 and the 47' that it was a good, seaworthy wall. Apparently the Court of Appeals overlooked the testimony of the resident maintenance engineer who testified that the respondents did construct *a new wall* in front of these lots, all of which was part of the District Council plan.

The Court may, at this point, inquire what importance is this foregoing point? It is of great importance because the exclusion of this 147' of wall which was constructed with the money from the special benefit and ad valorem taxes results is placing the cost of this particular improvement upon the backs of the other tax payers within the benefit district and by adding the amount of these costs to their assessment results in the confiscation of their property without due process of law in violation of the Fourteenth Amendment.

CONCLUSION

It is the contention of the petitioners that since the denial of your Honorable Court of the petition for the writ of certiorari that the petitioners have stated grounds of substantial or controlling effect, or other substantial grounds available to the petitioners although not previously presented.

1. The intervening circumstances are that the respondents now plan to condemn the sea wall of the petitioners who were exempted from the benefit taxes by the lower court and who were exempted from the payment of the benefit tax by the Court of Appeals as long as said petitioners own said property or until the respondents acquire said sea wall.

2. That the respondents now plan to assess and collect the benefit and ad valorem taxes from the petitioners, making said assessments retroactive until 1954.

3. That the Commissioners have failed to assess all of the property within the benefit district and are now assessing the other owners for the benefit of a few, facts supporting which were not before the Courts.

4. That the actions of the respondents from the time that the petition for writ of certiorari was filed until the present date indicates that the respondents have misinterpreted the decision of the Court of Appeals.

5. If said decision of the Court of Appeals is ambiguous, as is claimed by the petitioners, then your Honorable Body should grant the writ in order that the ambiguity be removed.

6. As a result of the misinterpretation or ambiguity of the decision of the Circuit Court of Appeals of Maryland the respondents are charging the petitioner and other owners for a sea wall which was constructed for the benefit of the owners of Lots 49, 50 and the owner of the 47' lot.

7. For these reasons the petitioners respectfully submit that this petition for reconsideration of the denial of the writ of certiorari by your Honorable Court should be granted.

In order to conserve the time of the Court, counsel herein has not restated the authorities set forth in the petition for writ of certiorari but does adopt the same as though restated.

Respectfully submitted,

THURMAN HILL,
Counsel for Petitioners,

ERCOLE LEONARDO,
ELSIE IRENE LEONARDO,
Petitioners.

Dated, Washington, D. C.
February 5, 1958.

Affidavit

DISTRICT OF COLUMBIA }
WASHINGTON, D. C. } ss:

Ercole Leonardo of lawful age, first being duly sworn, upon his oath deposes and says:

Your affiant is one of the petitioners in the case of *Ercole Leonardo and Elsie Irene Leonardo, Petitioners* vs. *Board of County Commissioners of St. Mary's County, Maryland, Respondents,* which case is now pending before the Supreme Court of the United States upon petition for reconsideration of the denial of the writ of certiorari.

Your affiant states that upon the 25th day of January 1958 he personally inspected the books and records in the office of the Treasurer of St. Mary's County, Maryland, as said records pertained to the assessments against property owners in connection with the erection of a sea wall by said County Commissioners and your affiant states that all statements and figures used in the petition for reconsideration of the denial of the writ of certiorari were furnished by him from said records and that he did transcribe said information and figures correctly from the record.

Further, your affiant sayeth not.

ERCOLE LEONARDO
Ercole Leonardo

Subscribed and sworn to before me this 29th day of January, 1958.

MARY J. BRUMLEY
Mary J. Brumley,
Notary Public, D. C.

(SEAL)

My Commission Expires September 14, 1962.

Affidavit

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss:

Thurman Hill, of lawful age, first being duly sworn, upon his oath deposes and says:

Your affiant is counsel for the petitioners in the case of *Ercole Leonardo and Elsie Irene Leonardo, Petitioners* vs. *Board of County Commissioners of St. Mary's County, Maryland, Respondents,* which case is now pending before the Supreme Court of the United States upon petition for reconsideration of the denial of the writ of certiorari.

Your affiant states that since the denial of the petition for the writ of certiorari by the Supreme Court that he has had three of four oral telephone conversations with the Honorable Wm. O. E. Sterling, counsel for the Board of County Commissioners of St. Mary's County, Maryland in reference to the case of Ercole Leonardo and Elsie Irene Leonardo versus said Board of County Commissioners and in addition to said oral conversations received one letter on the stationery of the Board of County Commissioners of St. Mary's County, Maryland in which letter certain things were set forth in reference to said case. In said letter counsel stated "As I advised you on the telephone the Commissioners are willing to pay Mr. Leonardo a fair price for his sea wall and that is as far as they can go in the matter." Your affiant states that thereafter, in a telephone conversation with counsel for the Board of County Commissioners, said counsel advised your affiant that by "fair price" the Commissioners meant the cost price to the Leonardos of constructing the sea wall. Your affiant asked said counsel if the Commissioners would

pay the Leonardos the sum of $3,030.00, which said sum represented what it had cost the Board of County Commissioners to construct the same amount of footage and he answered unequivocally "no".

Your affiant states that in another conversation your affiant inquired of counsel whether the Commissioners would release the Leonardos from the payment of the benefit tax and the interest on the bonds since the Leonardos had paid for the wall which was now being used by the District Council, providing further that the Leonardos paid the cost of repairs and maintenance. To this, Council for the Board of County Commissioners again stated that the Commissioners would not consider such an offer.

Your affiant further states that he advised counsel for the Board of County Commissioners that they had not included upon the assessment records 147 ft. of sea wall which had been paid for out of the bond issue and to this counsel stated that he was quite sure that what I stated were not the true facts.

Your affiant also inquired of said counsel if it were not true that they were still assessing all of the lot owners the same amount of interest that they had originally assessed them in 1954; to wit, $2,750.00, and he said he thought they still were assessing this amount. I then inquired of him whether it was not the duty of the Commissioners to reduce the interest as annual payments were made upon the principal of the bond issue and he said that he presumed that was the intention of the Board but they had not, as yet, been able to do so.

Further, your affiant sayeth not.

THURMAN HILL.
Thurman Hill

Subscribed and sworn to before me this 29th day of January, 1958.

MARY J. BRUMLEY
Mary J. Brumley,
(SEAL) *Notary Public, D. C.*

My Commission Expires September 14, 1962.

CERTIFICATE

I, Thurman Hill, attorney for petitioners herein, hereby certify that the above petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

THURMAN HILL
Thurman Hill

PROOF OF SERVICE

I, Thurman Hill, attorney for the petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of February, 1958 I served copies of the foregoing petition for rehearing denying writ of certiorari upon the Board of County Commissioners of St. Mary's County, Maryland, Leonardtown, Maryland and upon Wm. O. E. Sterling, Counsel for said Board, Leonardtown, Maryland, by mailing copies in duly addressed envelopes, first-class mail, to said parties.

THURMAN HILL
Thurman Hill,
Attorney for Petitioners
1025 Connecticut Ave., N. W.
Washington 6, D. C.